# IN THE UNITED STATES DISTRICT COURT
# FOR THE SOUTHERN DISTRICT OF TEXAS
# HOUSTON DIVISION

| | | |
|---|---|---|
| NATHAN SMITH<br>*Plaintiff,*<br><br>v.<br><br>THE ABANDONED VESSEL,<br>*In Rem* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. 4:07-00784 |

## TEXAS HISTORICAL COMMISSION'S MOTION TO INTERVENE

TO THE HONORABLE JUDGE OF THE COURT:

The Texas Historical Commission, an agency of the State of Texas, ("Commission") files this Motion to Intervene as a Defendant in this action and to file the attached Motion to Dismiss or For Judgment and Original Answer. In support, the Commission would respectfully show the Court the following:

## I.
## LEGAL STANDARD

1. The Commission contends that it is entitled to intervene as a matter of right. Federal Rule of Civil Procedure 24(a) provides as follows:

> On timely motion, the court must permit anyone to intervene who (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED R. CIV. P. 24(a).

2. The courts have interpreted Rule 24(a) (2) to require that: (1) the intervention

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application be timely; (2) the applicant have an interest relating to the property that is the subject of the action; (3) the applicant is so situated that the disposition may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest is inadequately represented by the existing parties. *See Sierra Club v. City of San Antonio,* 115 F.3d 311, 314 (5th Cir.1997) (citing *Sierra Club v. Glickman,* 82 F.3d 106, 108 (5th Cir.1996)).

## II.
## THE COMMISSION'S INTERVENTION MEETS THE STANDARDS

### A. The Commission's Intervention Is Timely.

3. The Fifth Circuit identified four factors to be considered when evaluating whether a motion to intervene is timely. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265-6 (5th Cir. 1977). The first factor is the length of time during which the potential intervenor actually knew or reasonably should have known of his interest in the case before he filed. *Id.* at 265. The second factor is the extent of prejudice the existing parties may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he knew or reasonably should have known of his interest in the case. *Id.* Third, the court should consider the extent of prejudice that the would-be intervenor may suffer if his petition is denied. *Id.* at 265-66. Finally, the court should evaluate any unusual circumstances militating either for or against a determination regarding a motion for intervention as a matter of right. *Id.* at 266.

4. In this case, the Commission files this Motion to Intervene as soon as practical after learning of the pending lawsuit. Both the Executive Director of the Commission, F. Lawerence Oaks, and undersigned counsel first learned of this lawsuit from a newspaper

article published on December 30, 2008, in the Austin American-Statesman, a copy of which is attached as Exhibit 1. An affidavit of Mr. Oaks attesting to this fact is attached as Exhibit 2. Upon inquiry, Mr. Oaks determined that some members of the Commission staff were aware of Mr. Smith's claims, but not that he had filed this lawsuit to advance these claims. *See* Exhibit 2. Thus, the first factor is satisfied because the Commission has filed this Motion promptly upon notice of this lawsuit. The Commission is not aware of any reason that the Commission should have known about this lawsuit before it was publicized in the newspaper.

5. The second factor is satisfied because prejudice to the plaintiff is considered only when there is delay by the intervenor in filing to join the suit.

6. The third factor is the extent of prejudice the Commission would suffer if its petition is denied. As will be shown below, Mr. Smith is claiming an interest in property that by law belongs to the State of Texas. If this suit is allowed to go forward without the presence of the Commission, its property rights will be prejudiced if the Court rules in Mr. Smith's favor.

7. The final factor the Court should consider is whether there are any unusual factors militating for or against the intervention. One such factor might be the fact that this suit has progressed to trial and is now being considered by the Court for a decision. The Commission contends that its intervention will not unduly delay a decision in this case. The Commission's claims are based upon applicable law and will not require the introduction of additional evidence. Unless the Court desires an oral hearing on this Motion, no additional proceedings before the Court will be required.

**B. The Commission Has an Interest Relating to the Property That Is the Subject of the Action.**

8. Under the Abandoned Shipwreck Act, 43 U.S.C. § 2101-2106 ("ASA"), the federal government asserts title to any abandoned shipwreck that is embedded in or on the submerged lands of a state. 43 U.S.C. § 2105 (a). The term "shipwreck" as used in the ASA, includes the cargo and contents of the vessel. 43 U.S.C. § 2102 (d). Further, and most importantly, the United States has transferred title to any shipwreck in or on the submerged lands of Texas to the State of Texas. 43 U.S.C. § 2105 (c). Accordingly, if, as alleged in the Complaint, Mr. Smith has located an abandoned shipwreck in or on the submerged waters of the State of Texas, under the ASA, the vessel and its contents belong to the State. It is necessary for the State of Texas to intervene in this case in order to protect its property rights.

9. The Commission is the agency of the State of Texas that has jurisdiction of abandoned vessels for the State of Texas. TEX. NAT. RES. CODE § 191.093. The State has asserted its title to abandoned shipwrecks. *Id.* This *in rem* action may result in a decision that would give title to Mr. Smith in direct conflict with the ASA and the laws of Texas.

**C. The Commission Is So Situated That the Disposition May, as a Practical Matter, Impair or Impede its Ability to Protect That Interest.**

10. This lawsuit is an *in rem* action against an allegedly-abandoned, shipwrecked vessel that is alleged to be in navigable waters in the State of Texas. Mr. Smith claims that he is "entitled to the exclusive title, ownership and possession of the VESSEL...." First Amended Original Complaint at 3. If Mr. Smith's suit is successful, the Court would issue an arrest warrant to take jurisdiction of the vessel and its contents, and then could award title

to Mr. Smith as he requests. Such an award of title to Mr. Smith would preclude the State of Texas from asserting or pursuing its claim under the ASA. The admiralty court has jurisdiction to adjudicate the rights of the salvor against the world. *Great Lakes Exploration Group, LLC v. Unidentified Wrecked and Abandoned Sailing Vessel*, 522 F.3d 682, 694 (6th Cir. 2008). Even if this lawsuit does not preclude the Commission from bringing a separate suit to assert its claim, judicial economy requires that the Commission be allowed to intervene to have these issues decided once and for all.

**D. The Commission's Interest Is Inadequately Represented by the Existing Parties.**

11. No party to this suit in any way represents the interests of the State of Texas or the Texas Historical Commission. Mr. Smith's interest in this matter is directly adverse to the interest of the State. Intervenor Marie Sorenson also does not represent the interest of the State or Commission. Her assertions in her Motion to Dismiss and Original Answer are that there is no vessel as Mr. Smith asserts, or that it is on her private land if it does exist. There is, of course, another possibility. Should the vessel be in or on the bed of a navigable waterway, she would have no interest in the vessel or its cargo, and no claim to it. Only the State and Commission, under the ASA, would have a claim to the vessel as against Mr. Smith. No party has heretofore asserted the interests of the State under the ASA.

12. Further, the Attorney General of Texas is required to represent the State and its agencies in the courts of the State, and by implication, those of the United States. TEX. CONST. Art. IV, § 22. An attorney other than an employee of the State may represent the State only through a contract approved by the Attorney General. TEX. GOV'T CODE

§ 402.0212. The Commission is an agency of the State of Texas. The Attorney General has not approved the representation of the interests of the State by any other attorney in this lawsuit.

## III.
## CONCLUSION

For the foregoing reasons, the Texas Historical Commission respectfully requests that the Court grant its Motion to Intervene and admit the Commission as a Party Defendant.

Respectfully submitted,

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First Assistant Attorney General

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**ATTORNEYS FOR INTERVENOR**
**TEXAS HISTORICAL COMMISSION**

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been delivered via Certified U. S. Mail, Return Receipt Requested, to counsel of record, on February 3, 2009, as follows:

Ronald B. Walker
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Houston, Texas 77010

JOE H. THRASH

ARTICLE AS PRINTED IN THE AUSTIN AMERICAN-STATESMAN, DECEMBER 31, 2008.

[illegible]

## Hunt for treasure sparks [illegible]

A California musician is fighting in federal court for the right to dig for treasure he says he believes is buried along the Texas Gulf Coast.

Nathan Smith [illegible] a lost treasure book, the satellite imagery of Google Earth and a metal detector to pinpoint the location of what he believes is a treasure worth [illegible] buried in the muck near the Mission River, the Houston Chronicle reported [illegible].

Smith says he believes a ship carrying gold and silver [illegible] in 1822 when [illegible].

The story goes [illegible] survivors [illegible] fell victim to cannibals [illegible] that Comanche Indians found some of the booty and buried it before fleeing the cannibals themselves.

U.S. District Judge David Hittner must decide whether the location, shrouded in secrecy, is within navigable waters of the Mission River and thus fair game or, as Smith's opponents claim, on land belonging to the estate of Agnes O'Connor [illegible].

Ron Walker, the Victoria lawyer representing the estate, said "we don't want anyone on our property to tear it up."

[illegible]

EXHIBIT 1

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**AFFIDAVIT**

STATE OF TEXAS
COUNTY OF TRAVIS

**F. Lawerence Oaks**, being first duly sworn, deposes and says:

1. "I am F. Lawerence Oaks, Executive Director of the Texas Historical Commission (THC). I direct the day-to-day operations of the Commission and am responsible for decisions of the Division with respect to filing lawsuits on behalf of the Commission. In my capacity as Executive Director, I first became aware of the existence of the above-styled lawsuit on or about December 30, 2008 when I read an article about it in the Austin American-Statesman newspaper. I asked my staff if other members of the staff were aware of the lawsuit previously, and was told that some members of the Archeology Division were aware of Mr. Nathan Smith's contentions concerning the alleged shipwreck, but none stated that they were aware of the existence of this lawsuit before the above date.

2. that he is over 21 years of age and fully competent to make this statement;

3. that he is duly authorized to make this affidavit; and

4. that the matters contained in this affidavit are based on personal knowledge and are true and correct."

EXECUTED on the 29 day of January, 2009, in Austin, Texas.

F. LAWERENCE OAKS

EXHIBIT
2

SIGNED under oath before me on this 29 day of January, 2009, to certify which, witness my hand and seal.

ESTHER GARZA
Notary Public State of Texas
My Comm. Expires
OCTOBER 05, 2009
Notary without Bond

Notary Public in and for the State of Texas

Esther Garza

**IN THE UNITED STATES DISTRICT COURT**
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| NATHAN SMITH | § | |
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| v. | § | |
| | § | CIVIL ACTION NO. 4:07-00784 |
| THE ABANDONED VESSEL, | § | |
| *In Rem* | § | |

## ORDER GRANTING MOTION TO INTERVENE

CAME TO BE CONSIDERED the Texas Historical Commission's Motion to Intervene [DKT No. ____] and the Court, having considered the motion and responses finds the motion should be GRANTED.

IT IS THEREFORE ORDERED that the Texas Historical Commission is admitted as a party Defendant to this action.

SIGNED February _____, 2009.

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U.S. DISTRICT JUDGE